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Supreme Court, U.S.
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No. 94-1679

In The

Supreme Court of the United States

October Term, 1994

ROBERT A. LESLIE,

Petitioner,

v.

WILLIAM C. LESLIE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Colorado

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Petition raise any issues within Supreme Court jurisdiction?

2. Has Petitioner adequately preserved his constitutional issues for Supreme Court review?

STATEMENT PURSUANT TO RULE 29.1

Respondent is not a corporation and has no parent companies, subsidiaries or affiliates.

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ROBERT A. LESLIE,

Petitioner,

v.

WILLIAM C. LESLIE,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Colorado

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of the State of Colorado (Opp. App. A) is reported at 886 P.2d 284 (Colo. App. 1994).

JURISDICTION

The judgment of the Court of Appeals of the State of Colorado was entered on April 21, 1994, and modified on denial of petition for rehearing on August 4, 1994. On January 17, 1995, the Supreme Court of the State of Colorado denied a petition for certiorari to the Colorado

Court of Appeals. The petition for writ of certiorari was filed in this Court on or about March 17, 1995, and was received by counsel for Respondent on March 20, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

This action arose from a will contest in Boulder County, Colorado, District Court. Both Petitioner Robert A. Leslie and Respondent William C. Leslie are the sons of the decedent, Robert W. Leslie. Petitioner is not a licensed attorney, and has appeared *pro se* throughout this proceeding and all related proceedings.

Respondent has filed this opposition pursuant to SUPREME COURT RULE 15.1 because of the many inaccurate statements and misrepresentations that Petitioner *pro se* has made in his petition. The Court should not presume that the petition has any merit merely because this Opposition has been filed. All of Petitioner's issues either do not implicate the jurisdiction of this Court, have not been preserved for Supreme Court review, or else are patently meritless.

The long history of convoluted proceedings in this matter had its genesis in a probate case opened in 1989, *In re Estate of Robert W. Leslie*, Boulder County (Colorado) District Court No. 89PR295, from which this proceeding arises. The decedent, Robert Wilson Leslie, left a will that divided his estate equally between his two sons and three grandchildren, so that Petitioner, the decedent's younger son, received only a one-fifth share of the estate.

The will was admitted to formal probate in 1989. Unhappy with the division of property, Petitioner filed pleadings in the formal testacy proceeding contending that the will was forged and objecting to its probate. A hearing was scheduled for October 12, 1989 on notice to all interested persons pursuant to COLO. REV. STAT. §§ 15-10-401(1)(a) and 15-12-403(1)(a) (1987). Respondent, as the proponent of the will, sent notice of the hearing to Petitioner by certified mail on September 29, 1989, and the receipt established that Petitioner received it on October 2, 1989.

The hearing was held as scheduled on October 12, 1989. Although Petitioner filed an objection, he did not appear at the hearing either in person or through counsel. At the hearing, the proponents of the will presented evidence that the decedent's signature was on the will, as well as an affidavit from a witness to the signature stating that the witnesses saw the decedent sign the will and declared it to be his will. The probate court ruled that because the will was self-proving, compliance with the signature and other requirements of execution were presumed unless there was evidence of fraud or forgery. Because Petitioner failed to present any evidence rebutting the authenticity or proper execution of the will, the probate court ordered it admitted to formal probate.

Petitioner appealed the order admitting the will to probate to the Colorado Court of Appeals, which affirmed. *Leslie v. Colorado National Bank* (Colo. App. No. 89CA2010, December 6, 1990), *cert. denied*, (Colo. No. 91SC45, April 15, 1991) (Opp. App. C). The Colorado Court of Appeals rejected Petitioner's argument that the will was invalid because the decedent had not initialed its

pages, and further found that Petitioner had ample notice of the October 1989 hearing under the Colorado Probate Code.

Petitioner then filed an independent action in the United States District Court for the District of Colorado, in which he attempted to relitigate the same issues that had been resolved against him in the state probate action. This action was dismissed for want of federal subject matter jurisdiction. *Robert A. Leslie v. Colorado Natl. Bank of Denver et al.*, Civil Action No. 91-S-2123 (D. Colo., September 29, 1992) (Opp. App. G). In dismissing the action, the district court also observed that "each of the issues that the Plaintiff seems to complain of has been previously litigated," and that "this court has no authority to rescind a probate order previously unsuccessfully appealed in the state court." (Opp. App. G at 21a).

Undaunted by two conclusive adjudications against him, Petitioner later filed another independent action, *Robert A. Leslie v. William A. Leslie*, Boulder County (Colorado) District Court No. 92CV1470, denominated as a "Complaint for Recession[sic] Based on Fraud and for Relief Based on Fraud." In that separate lawsuit, Petitioner named as defendants the other heirs of the Leslie estate, as well as their attorneys. In his complaint, Petitioner alleged that the decedent's will was "fraudulent," and had been perpetrated by the defendants, including the attorneys for the Leslie heirs. In essence, Petitioner reiterated his arguments, previously rejected by the probate court and Colorado Court of Appeals, that he had not received his proper share of the estate because a fraudulent will had been admitted to probate.

On the defendant's motion, Petitioner's fraud action was dismissed as barred by *res judicata*. Petitioner's appeal of that dismissal was likewise unsuccessful. The Colorado Court of Appeals held that the issues had been resolved against Petitioner in the earlier probate litigation, so that his claims were barred by *res judicata* and collateral estoppel. *Leslie v. Leslie* (Colo.App. No. 93CA0185, March 10, 1994) (not selected for official publication), *cert. denied*, (Colo. No. 94SC254, August 22, 1994) (Opp. App. E). The Court of Appeals also held that because Petitioner had never requested a hearing in the trial court, his claim that the dismissal of his complaint without a hearing denied him due process had not been preserved for review.

Administration of the Leslie estate continued in Boulder District Court. In December 1991, Colorado National Bank of Denver, as personal representative of the Leslie estate, petitioned the probate court for an order of final settlement and distribution, which was entered on December 11, 1991. Because of Petitioner's federal district court action, however, the probate court granted the personal representative leave to withhold distribution of the estate, and to apply for an additional order reimbursing the estate for the expense of defending the federal litigation. After the federal action was dismissed in September 1992, the personal representative requested a supplemental order of final settlement and distribution, of which Petitioner was given notice on January 29, 1993. Petitioner then filed a written objection to the personal representative's request for a supplemental order.

Although the probate court held a hearing on Petitioner's objection on February 24, 1993, he again failed to

appear either in person or through counsel. The probate court subsequently entered a Supplemental Order of Final Settlement and Distribution, dated February 24, 1993. The Supplemental Order dismissed all of Petitioner's objections, and charged his distributive share of the estate with the attorney fees and other costs that the personal representative incurred in defending against Petitioner's unsuccessful attempts to relitigate the validity of the will.

On appeal, the Colorado Court of Appeals again affirmed. *In re Estate of Leslie*, 886 P.2d 284 (Colo. App. 1994) (Opp. App. A). The court refused to review Petitioner's claims that the will was fraudulent and was improperly admitted to probate, as having already been resolved against him in the prior appeals. *Id.*, 886 P.2d at 285-86 (Opp. App. A at 3a). The Court of Appeals also affirmed the probate court's assessment of attorney fees and estate costs against Petitioner's distributive share, ruling that:

> [T]hroughout the extensive litigation of this matter, including two appeals, the trial court has noted the lack of substance and the groundlessness of petitioner's claims and defenses, thus implicitly finding that his numerous actions have been frivolous. . . .
>
> Much of petitioner's conduct in initiating and prosecuting needless and insubstantial litigation has resulted in the frustration of this basic purpose and the possible depletion of the assets of the estate. Accordingly, and in the light of the findings of the several courts which have been forced needlessly to consider this matter, we cannot say that the probate court here

> abused its discretion in awarding against the petitioner's distributive share the administrative costs and legal fees incurred by the estate in defending against the unsuccessful and groundless litigation in this and the two other cases that concerned, principally, the same issues that had been previously resolved.

Id., 886 P.2d at 288 (Opp. App. A at 8a-9a). The court also concluded that "Petitioner's other contentions are without merit." *Id.*

On January 17, 1995, the Colorado Supreme Court denied Petitioner's petition for writ of certiorari to the Colorado Court of Appeals. *In re Estate of Leslie* (Colo. No. 94SC515, January 17, 1995) (Opp. App. B).

SUMMARY OF ARGUMENT

The petition does not present any questions within the jurisdiction of the Supreme Court and thus does not merit Supreme Court review. Most of the issues raised in the petition present questions of purely state law; many of the issues pertain to prior state court appeals, and are thus outside Supreme Court jurisdiction. Petitioner *pro se* has failed to preserve any of his federal constitutional issues for review because they were raised for the first time in the state appellate courts or else are raised for the first time here. Even these issues had been adequately preserved for Supreme Court review, they are clearly meritless.

REASONS FOR DENYING THE WRIT

I. The petition does not raise any issues within Supreme Court jurisdiction.

Although the argument does not exactly track the list of issues presented, the petition appears to raise the following discrete issues:

(1) Petitioner was denied his Seventh Amendment right to a jury trial in the probate court testacy proceeding, and that the denial of a jury trial consequently denied him his right to due process and equal protection under the Fourteenth Amendment;

(2) The dismissal of Petitioner's complaint in *Leslie v. Leslie*, Boulder County District Court No. 92CV1470, violated the Colorado Rules of Civil Procedure and denied him due process of law;

(3) The probate court was biased against him in ordering the attorney fees and additional costs incurred by the Leslie estate in defending against his groundless litigation to be taxed against his distributive share of the estate;

(4) The probate court acted in excess of its jurisdiction in taxing the attorney fees and estate costs against his distributive share of the estate;

(5) COLO. REV. STAT. § 15-10-102(1)(c) (1987) violates Petitioner's right to a jury trial under the Seventh Amendment;

(6) The probate court's order taxing the attorney fees and estate costs against Petitioner's distributive

share of the estate "is in conflict with the published case law" (Pet. at A36);

(7) The probate court improperly charged Petitioner's share of the estate with the Petitioner's obligation to the decedent on certain promissory notes;

(8) The Colorado Court of Appeals' decision in *Leslie v. Leslie* (Colo. App. No. 93CA0185, March 10, 1994) (not selected for official publication), *cert. denied*, (Colo. No. 94SC254, August 22, 1994) (Opp. App. E) was not *res judicata* as to his subsequent claims in the probate court that the will was fraudulent;

(9) The purpose of COLO. REV. STAT. § 15-10-102(1)(c) (1987) to "promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors" violates Petitioner's right to due process of law;

(10) The Colorado Court of Appeals erred in finding that the six different grounds for dismissal of Petitioner's federal action "most assuredly constitute grounds for a finding of groundless and frivolous litigation";

(11) The Colorado Court of Appeals erred in finding that Petitioner's previously dismissed state action was groundless and frivolous; and

(12) The doctrine of equitable estoppel was improperly applied.

Of these multifarious issues, the only ones that conceivably raise clear questions of federal law within the jurisdiction of the Supreme Court are Petitioner's claims

that he was denied a jury trial under the Seventh Amendment in the probate court, and that the Colorado Probate Code is unconstitutional because it violates due process and the Seventh Amendment right to a jury trial. All of Petitioner's other issues are outside this Court's jurisdiction, either because they were not raised in a timely manner, or else because they raise only questions of state law.

A.

This Court lacks subject matter jurisdiction over any constitutional issues raised in Petitioner's two prior appeals because no timely petition for certiorari was filed in either of those cases.

The two prior unpublished decisions of the Colorado Court of Appeals were issued on December 6, 1990 and March 10, 1994 respectively. *See In re Estate of Leslie* (Colo. App. No. 89CA2010, December 6, 1990) (Opp. App. C); *Leslie v. Leslie* (Colo. App. No. 93CA0185, March 10, 1994) (not selected for official publication) (Opp. App. E). Certiorari was denied by the Colorado Supreme Court in each of these appeals on April 15, 1991 and on August 22, 1994 respectively. *See In re Estate of Leslie* (Colo. No. 91SC45, April 15, 1991) (Opp. App. D); *Leslie v. Leslie* (Colo. No. 94SC254, August 22, 1994) (Opp. App. F). Because Petitioner failed to seek timely review by certiorari in the Supreme Court in either of these two prior appeals, this Court lacks subject matter jurisdiction to consider any issue that was previously raised or could have been raised in them. Supreme Court Rule 13.1; 28

U.S.C. § 2101(c); *see FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952); *cf. In re Estate of Leslie*, 886 P.2d 284, 286 (Colo. App. 1994) (applying same rule to state appellate proceeding).

In particular, Petitioner's argument that the dismissal of his complaint in *Leslie v. Leslie*, Boulder County District Court No. 92CV1470, violated the Colorado Rules of Civil Procedure and thus denied him due process of law concerns only his prior appeal in *Leslie v. Leslie* (Colo. App. No. 93CA0185, March 10, 1994) (Opp. App. E), not the decision as to which he now seeks certiorari. Accordingly, because no timely petition was filed in that matter, these issues are not properly before this Court. *FTC v. Minneapolis-Honeywell Regulator Co., supra.*

Moreover, because unpublished decisions of the Colorado Court of Appeals have no precedential value, *see* COLO.APP.R. 35(f),[1] neither of these decisions would merit

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[1] Colorado Appellate Rule 35(f) provides, in pertinent part:

> **(f) Published Opinions of Court of Appeals.** A majority of all of the judges of the Court of Appeals shall determine which opinions of that court shall be selected for official publication. They shall be published in whatever official publication is designated by the Supreme Court. Those opinions selected for official publication shall be followed as precedent by the trial judges of the state of Colorado.
>
> No opinion of the Court of Appeals shall be selected for official publication unless it satisfies one or more of the following standards: (1) the opinion lays down a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) the opinion involves a legal issue of continuing public interest; (3) the opinion directs

Supreme Court review even if jurisdiction had been perfected.

B.

Petitioner also raises a number of state law issues that are not within Supreme Court jurisdiction. State law clearly and exclusively applies to the issues of the state probate court's jurisdiction and equitable power to order that Petitioner's distributive share of the estate be taxed with the attorney fees and additional estate costs

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attention to the shortcomings of existing common law or inadequacies in statutes; (4) the opinion resolves an apparent conflict of authority.

An opinion of the Court of Appeals not selected for official publication shall bear, on the title page, the legend, "NOT SELECTED FOR PUBLICATION."

The Colorado Court of Appeals has also adopted the following policy concerning citation of unpublished opinions:

POLICY OF THE COURT CONCERNING CITATION OF UNPUBLISHED OPINIONS

By majority vote of the Judges of the Colorado Court of Appeals the following policy was adopted:

Citation of unpublished opinions is forbidden with the following exceptions:

(1) unpublished opinions may be cited to explain the case history or to establish the doctrines of law of the case, *res judicata*, or collateral estoppel;

(2) this policy shall not apply to opinions that were designated as "Not Selected for Official Publication" and were announced between January 1, 1970 and November 1, 1975, but nevertheless were published in the Pacific Second Reporter.

BY THE COURT: Alan L. Sternberg, Chief Judge

Dated: April 28, 1984

incurred by the Leslie estate in defending against Petitioner's groundless litigation. State law also clearly governs the propriety of the probate court's exercise of discretion in ordering that the attorney fees and costs be taxed against Petitioner's distributive share. *See In re Estate of Leslie*, 886 P.2d at 286-87. No federal question of any kind is presented on this point.

Similarly, the propriety of the probate court's order charging Petitioner's distributive share with the promissory notes owed by Petitioner to the decedent, as well as the enforceability of those notes, are also questions that arise purely under state law, namely the Uniform Probate Code and Uniform Commercial Code as adopted in Colorado. *See generally* COLO. REV. STAT. § 4-3-101 *et seq.* (1992); COLO. REV. STAT. § 15-10-101 *et seq.* (1987). Inasmuch as the Colorado Court of Appeals relied on COLO. REV. STAT. § 13-17-102 (1987) in determining that Petitioner's dismissed state and federal actions were groundless and frivolous litigation, this, too, presents only an issue of state law.

Finally, the Colorado Court of Appeals' determination that the prior judgments against Petitioner were *res judicata* to his subsequent claims in the probate court that the will was fraudulent, along with the applicability of the doctrine of equitable estoppel, are also matters purely of state law.

Because every one of these issues involves purely a question of state law, or else Petitioner's objections to the state court's application of state law, they should not be considered on petition for writ of certiorari. *See International Longshoremen's Assn., AFL-CIO v. Davis*, 476 U.S.

380, 387 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 260 n.6 (1980).

II. Any constitutional issues raised in the petition have not been preserved for Supreme Court review.

A.

Petitioner raises a number of constitutional issues, all of them for the first time here. Hence, these issues have not been adequately preserved for review. In any event, the petition does not present any grounds for certiorari under SUPREME COURT RULE 10. None of these issues implicates either the jurisdiction of this Court or any reason to issue a writ of certiorari to the Colorado Court of Appeals.

Petitioner argues, in an indefinite way, that various actions of the probate court and the Colorado Court of Appeals violated his rights to due process and equal protection. Petitioner disregards SUPREME COURT RULE 14.1(h) by failing to specify the stage of the proceedings in which the questions sought to be reviewed were raised. The record shows that Petitioner's many "due process" claims were never raised in either the trial court, the Colorado Court of Appeals, or the Colorado Supreme Court, nor were they passed upon by any of those courts. Failure to preserve these issues below precludes their consideration by this Court on certiorari. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 198-200 (1899); *see also* SUPREME COURT RULE 14.1(h).

Petitioner's challenge to the constitutionality of COLO. REV. STAT. § 15-10-102(1)(c) was not raised in the probate court, nor was it raised in the Colorado Court of Appeals or in the Colorado Supreme Court. Even if it had been raised in the state appellate courts, questioning the constitutionality of a statute for the first time on appeal in a state court does not successfully preserve the issue for review in the Supreme Court. *See Board of Directors of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). Questioning the constitutionality of a state statute for the first time on petition for writ of certiorari also does not successfully raise the issue in this Court. *See Head v. New Mexico Bd. of Exmrs. in Optometry*, 374 U.S. 424, 433, n.12 (1963); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Monks v. New Jersey*, 398 U.S. 71, 72 (1970).

Because Petitioner did not seek review of the constitutionality of COLO. REV. STAT. § 15-10-102(1)(c) of the Colorado Probate Code on any ground in any of the state courts below, he has failed to preserve this issue for review. Hence, these issues, too, have not been preserved for Supreme Court review. *See Bankers Life & Cas. Co. v. Crenshaw, supra; Tacon v. Arizona, supra; Head v. New Mexico Bd. of Exmrs. in Optometry, supra.*

B.

As for any constitutional issues that Petitioner may actually have preserved in the courts below, they are clearly meritless.

Although Petitioner claims that various orders and statutes have denied him "due process" and "equal protection," he did not expressly allege in either the

Colorado Court of Appeals or Colorado Supreme Court that such alleged denials were denials of the "due process" or "equal protection" guaranteed by the Fourteenth Amendment to the United States Constitution. A generic reference to "due process" or "equal protection" is not sufficient to preserve a *federal* claim, *see Bankers Life & Cas. Co. v. Crenshaw, supra*, particularly where the state constitution contains similar provisions guaranteeing due process and equal protection of the laws. *See* COLO. CONST. art. II, §§ 6, 25. In the state appellate courts below, Petitioner did not expressly identify the federal constitution as the source of his alleged "due process" rights,[2] and does not now identify the precise manner in which he was denied either due process or equal protection under the federal constitution. Thus, even if Petitioner has adequately preserved his constitutional challenge, it is unclear whether he has presented an issue of federal or state law. *See Webb v. Webb*, 451 U.S. 493, 495-501 (1981); *Bankers Life & Cas. Co. v. Crenshaw, supra*. For this reason, too, certiorari should be denied.

Petitioner's only other issue that raises any federal question is his contention that his Seventh Amendment right to a jury trial was violated. Although Petitioner claims he was denied a jury trial in the probate court, this was because he never asked for one. COLO. REV. STAT. § 15-10-306(1) (1987), in fact, expressly provides that, "If

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[2] In a phrase repeated nine times in his Opening Brief in the Colorado Court of Appeals, Petitioner stated that "Petitioner's objections are directed at the illegal rulings of the Honorable Judge Santead[sic], and his denial of petitioner's due process rights." Petitioner did not identify the source of these "due process rights" as being either the federal or state constitution.

duly demanded, a party is entitled to trial by jury in a formal testacy proceeding and any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury." Notwithstanding his failure to "duly demand" a jury, Petitioner argues that this procedure violated his Seventh Amendment right to a jury trial, and that COLO. REV. STAT. § 15-10-102(1)(c) of the Colorado Probate Code also violates his Seventh Amendment rights. Because the Seventh Amendment has been construed not to apply to the States under the Fourteenth Amendment, these arguments are without merit. *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557 (1874); *see Howlett v. Rose*, 496 U.S. 356, 383 n.17 (1990); *see also Firelock, Inc. v. District Court*, 776 P.2d 1090, 1096 (Colo. 1989).

C.

This is a case of a stubborn and abusive *pro se* litigant who does not understand judicial procedure and who refuses to abide by the judgments and orders rendered against him. The probate court found that Petitioner's claims were groundless and frivolous, and the Court of Appeals upheld this finding. Although two of three judges of the division of the Colorado Court of Appeals declined to find Petitioner's appeal frivolous under COLO.APP.R. 38(d), it is obvious that his appeal was replete with arguments that have no support in law or fact. His petition for writ of certiorari to this Court is simply more of the same. Even if his issues were not clearly meritless, they are either outside Supreme Court jurisdiction, or else have not been preserved for review.

Consequently, there is nothing of substance in the petition to merit this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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DATED: April 20, 1995

APPENDIX

APPENDIX A

COLORADO COURT OF APPEALS April 21, 1994
No. 93CA0409.

IN THE MATTER OF THE ESTATE OF ROBERT W. LESLIE, Deceased.

ROBERT A. LESLIE,

Petitioner-Appellant,

v.

WILLIAM C. LESLIE, MARGARET A. LESLIE, DAVID LESLIE,

Respondents-Appellees,

and

WALTER BARNES, LLOYD ROWLAND, AND BRADLEY, CAMPBELL, CARNEY & MADSEN,

Appellees.

[886 P.2d 284]

APPEAL FROM THE DISTRICT COURT OF BOULDER COUNTY
Honorable Morris W. Sandstead, Jr., Judge
No. 89PR295

Division II APPEAL DISMISSED IN PART
Opinion by JUDGE JONES. AND ORDER AFFIRMED
Metzger and Ney, JJ., concur

As Modified on Denial of Petition for Rehearing of Respondents-Appellees, August 4, 1994.*

Petition for Rehearing of Plaintiff-Appellant Denied, August 4, 1994.

*Metzger, J., would grant rehearing.

In this proceeding for administration of the estate of the decedent, Robert Wilson Leslie, petitioner, Robert A.

Leslie, appeals the supplementary order of final settlement and distribution entered by the probate court. We dismiss the appeal in part and affirm the order.

Initially, we note that the record reflects that two of the respondents set forth in the caption, Margaret A. Leslie and David Leslie, were not represented by counsel before the probate court. Also, they received no notice of this appeal against them. Accordingly, the appeal is dismissed as to them. C.A.R. 3(a).

Additionally, Walter Barnes, Lloyd Rowland, and Bradley, Campbell, Carney & Madsen (a law firm), set forth as appellees by petitioner, are not reflected in the record as parties of interest in the decedent's estate and are not proper parties to this appeal. Accordingly, this appeal is dismissed as to those parties. C.A.R. 3(a).

I.

Petitioner initially contends that the underlying will is invalid as fraudulent and that the probate court, therefore, erred in entering its orders of final settlement and distribution. We disagree.

In an earlier appeal arising out of this estate matter, *Leslie v. Colorado National Bank*, (Colo.App. No. 89CA2010, December 10, 1993) (not selected for official publication), a division of this court concluded that the will had been properly executed and, thus, affirmed the orders of the probate court admitting the decedent's will to formal probate. *See O'Brien v. Wallace*, 145 Colo. 291, 359 P.2d 1029 (1961). There, the division noted, with particularity, that petitioner was given sufficient notice of the hearing

of October 12, 1989, on the issue of whether the will should be admitted to probate. *See* §§ 15-10-401(1)(a) and 15-12-403(1)(a), C.R.S. (1987 Repl.Vol. 6B). Petitioner attempts, once again, to have that issue reviewed here. A critical part of petitioner's claim in the previous case was the allegation that the will was fraudulent. There, both the trial court and this court resolved those issues against petitioner.

Matters resolved by that appeal may not be reviewed again here. *See Dando Co. v. Mangini*, 107 Colo. 170, 109 P.2d 1055 (1941).

II.

Petitioner also contends that the probate court erred in charging certain litigation and administration expenses against his share of the distribution of the estate. We perceive no error.

The record reflects that final settlement and distribution of the estate here was delayed, and additional fees and costs were incurred, by petitioner's unsuccessful attempts to challenge the validity of the will and its final administration. We have noted above petitioner's challenge in this court of earlier orders entered in this matter by the probate court. Following our disposition there, petitioner's petition for certiorari was denied by the Colorado Supreme Court on April 15, 1991.

Thereafter, in 1991, petitioner filed an action in the United States District Court for the District of Colorado (Civil Action No. 91-S-2123) challenging the validity of

the will. That matter was dismissed on September 29, 1992.

Following that dismissal, petitioner filed a separate civil action in the Boulder County District Court, No. 92CV1470, apparently based on fraud, challenging the validity of the will. That action was dismissed on numerous grounds. Petitioner appealed dismissal of that action to this court. A division of this court affirmed the dismissal, determining, *inter alia*, that petitioner had failed to request a hearing on respondents' motions to dismiss, that the issues raised on appeal had been resolved in the earlier probate litigation, and that the appeal was barred by *res judicata*. *Leslie v. Leslie*, (Colo.App. No. 93CA0185, March 10, 1994) (not selected for official publication).

Finally, on or about February 24, 1993, after a hearing on the personal representative's petition here, and petitioner's objections thereto, *see* § 15-12-1001, C.R.S. (1987 Repl.Vol. 6B), the supplemental order of final settlement and distribution was entered. Although petitioner was given notice thereof in January 1993, he chose not to be present at the hearing.

As a part of this order, the probate court stated: "All personal representative and attorney fees in excess of those ordered to be paid out of the general estate [, *i.e.*, fees attributable to his unsuccessful attempts to challenge the will and the orders of the various courts involved,] were and are charged against the distributive share of Dr. Robert A. Leslie, M.D."

This order followed from a part of the original order for final settlement and distribution, dated December 11,

1991. In that order, in anticipation of the other cases to be filed by petitioner covering issues already litigated, the probate court stated that should such cases be filed, the personal representative was authorized to hold up the final distribution but that, in such event, the personal representative "may apply to this Court for an additional Order or Orders regarding the payment and burden of additional expense."

As to whether the litigation and administration expenses attributable to the attempts of the petitioner to challenge the will and its final administration were appropriately charged against the petitioner's distributive share, there is no Colorado statutory or case law. However, we are persuaded by the cases from other jurisdictions that fees and expenses may be so collected.

In *Webbe v. First National Bank & Trust Co.*, 93 Ill.Dec. 886, 487 N.E.2d 711 (Ill.Dist.Ct.App.1985), one of several beneficiaries of a trust sued unsuccessfully in a suit that the court found to be "groundless and brought without reasonable cause." The appellate court, in upholding the charging of resultant legal fees and administrative costs against only that beneficiary's distributive share, stated:

> [W]hen one of several beneficiaries brings essentially groundless and unsuccessful litigation against a trustee the purpose of which was to benefit only himself, no reason suggests itself why the other beneficiaries, who did not join with him, sought no relief and had no voice in the conduct of the case, should share the expense with the initiating beneficiary. If such were not the case, a beneficiary could assault will and trust provisions attempting to increase his individual shares secure in the knowledge

> that, if he was unsuccessful, the cost would be borne by the other beneficiaries equally and not recovered solely out of the share of the party seeking to further his own ends. This would not seem to be just.

Webbe v. First National Bank & Trust Co., supra, 93 Ill.Dec. at 889, 487 N.E.2d at 714. *See Dayton v. Conger,* 448 So.2d 609 (Fla.Dist.Ct.App.1984); *In re Estate of Campbell,* 46 Haw. 475, 382 P.2d 920 (1963); *Boston Safe Deposit & Trust Co. v. Stone,* 348 Mass. 345, 203 N.E.2d 547 (1965); *In re King's Estate,* 336 Pa. 1, 7 A.2d 297 (1939).

The Colorado Probate Code is equitable in nature. Section 15-10-103, C.R.S. (1987 Repl.Vol. 6B). It does not, however, specifically provide for payment of administrative expenses and attorney fees from an individual's distributive share, even if that heir has individually caused such costs to be incurred. Nevertheless, we conclude that the probate court's order of payment may be upheld here under the circumstances attending petitioner's relentless pursuit of the very same issues in three separate trial courts, in both the state and federal jurisdictions, and in three appeals to this court.

Section 13-17-102, C.R.S. (1989 Repl.Vol. 6A), provides that in any civil action "of any nature," a party asserting a claim or defense may have fees imposed against such party if the claim or defense being asserted is frivolous and lacking in substantial justification. Thus, the costs imposed by the probate court here must be viewed in the context of findings by the probate court, and the other courts involved, concerning whether the

extraneous litigations unsuccessfully pursued by petitioner and leading to the additional costs were substantially lacking in justification.

In the federal court action, the court set forth six grounds for dismissal, any one of which could reasonably justify a finding that the action was frivolous and groundless. The cumulative effect of the six grounds would, in a Colorado state court, most assuredly constitute grounds for a finding of groundless and frivolous litigation.

In the separate Boulder district court action, the trial court summarily dismissed petitioner's action, adopting as justification all of the grounds set forth by the respondents as to why the complaint should be dismissed. One such ground was as follows:

> The complaint, taken together with the judgment of the Colorado Court of Appeals in Case No. 89CA2010, and with the federal district courts' orders of dismissal [there was also a matter filed by petitioner in, and dismissed by, the United States District Court for the Northern District of Oklahoma (Civil Action No. 92-C-102-E), challenging the validity of the will], reveals that the plaintiff has made no inquiry into the facts or the law, that the plaintiff does not believe that the pleading is 'well grounded in fact,' that the legal theory asserted in the complaint is not based on existing legal principles or a 'good faith argument' for the modification of existing law, and that the pleading was filed for the purpose of causing delay and harassment and an increase in the cost of litigation, *see Henry v. Kemp*, 829 P.2d 505 (Colo.App. 1992); the plaintiff should thus be required to

pay the defendants' fees and costs pursuant to C.R.C.P. 11 and C.R.S. § 13-17-102.

Thus, by inference, the trial court found that action to be frivolous and groundless. We have noted above that on appeal of that action a division of this court affirmed the trial court, although it declined to award attorney fees for that separate appeal.

Finally, throughout the extensive litigation of this matter, including two appeals, the trial court has noted the lack of substance and the groundlessness of petitioner's claims and defenses, thus implicitly finding that his numerous actions have been frivolous.

The General Assembly promulgated the Colorado Probate Code for the basic purpose of promoting "a speedy and efficient system for settling the estate of the decedent and making distribution to his successors." Section 15-10-102(2)(c), C.R.S. (1987 Repl.Vol. 6B); *In re Estate of Dire*, 851 P.2d 271 (Colo.App.1993).

Much of petitioner's conduct in initiating and prosecuting needless and insubstantial litigation has resulted in the frustration of this basic purpose and the possible depletion of the assets of the estate. Accordingly, and in the light of the findings of the several courts which have been forced needlessly to consider this matter, we cannot say that the probate court here abused its discretion in awarding against the petitioner's distributive share the administrative costs and legal fees incurred by the estate in defending against the unsuccessful and groundless litigation in this and the two other cases that concerned, principally, the same issues that had been previously

resolved. *See Webbe v. First National Bank & Trust Co., supra.*

We conclude that petitioner's other contentions are without merit. We decline to award attorney fees and costs as to this appeal.

The order of the probate court is affirmed. This appeal is dismissed as to Margaret A. Leslie, David Leslie, Walter Barnes, Lloyd Rowland, and Bradley, Campbell, Carney & Madsen.

METZGER and NEY, JJ., concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
No. 94SC515
CERTIORARI TO THE COLORADO COURT OF APPEALS,
CASE NO. 93CA0409
DISTRICT COURT, BOULDER COUNTY, NO. 89PR295

ORDER OF COURT

ROBERT A. LESLIE,

Petitioner,

v.

WALTER BARNES, LLOYD ROWLAND, BRADLEY, CAMPBELL, CARNEY & MADSEN, P.C., WILLIAM C. LESLIE, MARGARET ANN LESLIE, AND DAVID LESLIE,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after reviewing the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 17, 1995.

APPENDIX C

COLORADO COURT OF APPEALS December 6, 1990
No. 89CA2010 NOT SELECTED FOR PUBLICATION

IN THE MATTER OF THE ESTATE OF ROBERT WILSON LESLIE, Deceased.

ROBERT A. LESLIE,

Petitioner-Appellant,

v.

COLORADO NATIONAL BANK OF DENVER, Personal Representative, and WILLIAM C. LESLIE, MARGARET ANN LESLIE, DAVID LESLIE, AND ROBERT J. LESLIE,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF BOULDER COUNTY
Honorable Roxanne Bailin, Judge
No. 89PR295

Division I JUDGMENT AFFIRMED
Opinion by JUDGE TURSI
Pierce and Plank, JJ., concur

Petitioner, Robert Andrew Leslie, a son of the decedent, appeals from the trial court order admitting his father's 1968 will to formal probate. We affirm.

Petitioner filed pleadings in the formal testacy proceedings objecting to the probate of the will, asserting that the will was forged. A hearing on the matter was subsequently set for October 12, 1989. The record shows that the proponents of the will sent notice of the hearing to petitioner both by regular mail and by certified mail on September 29, 1989, and the certified mail return receipt card indicates that the notice was delivered to petitioner on October 2, 1989.

The hearing was held as scheduled on October 12, 1989, although petitioner failed to appear for the hearing. The will, which was self-proving, had previously been filed with the court. *See* § 15-11-504, C.R.S. (1987 Repl. Vol. 6B). At the hearing, the proponents of the will also presented testimony indicating that the decedent's signature was on the will, as well as an affidavit from one of the witnesses to the will stating that the witnesses saw the decedent sign the will and that the decedent at that time declared it to be his will.

The trial court properly ruled that, because the will was self-proved, compliance with signature and other requirements of execution were presumed unless there was evidence in rebuttal showing fraud or forgery. *See* § 15-12-406(2), C.R.S. (1987 Repl. Vol. 6B). Although petitioner raised the issue of fraud or forgery in his pleadings, no evidence was presented at the hearing rebutting the validity of the will. Accordingly, since the will was properly executed as a matter of law, the trial court properly ordered that the will be admitted to formal probate. *See O'Brien v. Wallace*, 145 Colo. 291, 359 P.2d 1029 (1961).

Contrary to petitioner's argument, there is no critical defect in the will by virtue of the fact that the attestation clause erroneously states that the decedent has initialed the first four pages of the will. Such initials are not required for a valid will, and the erroneous recital in the attestation clause does not rebut the presumption of proper execution from the remaining recitals in the attestation clause. *See* § 15-11-502, C.R.S. (1987 Repl. Vol. 6B); *Brock v. Erickson*, 28 Colo. App. 555, 475 P.2d 346

(1970); 2 W. Bowe & D. Parker, PAGE ON WILLS § 19.141 (1960).

The trial court also properly rejected petitioner's argument that he was not given sufficient notice of the hearing under the Colorado Probate Code. Notwithstanding petitioner's assertion that he had only six days actual notice in advance of the hearing, the record shows delivery of notice to petitioner or his agent ten days in advance of the hearing, and, in any event, the Colorado Probate Code requires only that notice be given by mailing such ten days in advance of the hearing. *See* §§ 15-10-401(1)(a) & 15-12-403(1)(a), C.R.S. (1987 Repl. Vol. 6B).

Petitioner's remaining contentions are without merit.

Order affirmed.

JUDGE PIERCE and JUDGE PLANK concur.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 91SC45
CERTIORARI TO THE COLORADO COURT OF APPEALS
NO. 89CA2010
DISTRICT COURT, BOULDER COUNTY, 89PR295

ORDER OF COURT

IN THE MATTER OF THE ESTATE OF ROBERT WILSON LESLIE, Deceased.

ROBERT A. LESLIE,

Petitioner,

v.

COLORADO NATIONAL BANK OF DENVER, Personal Representative, and WILLIAM C. LESLIE, MARGARET ANN LESLIE, DAVID LESLIE, and ROBERT J. LESLIE,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after reviewing the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 15, 1991

APPENDIX E

COLORADO COURT OF APPEALS March 10, 1994
No. 93CA0185 NOT SELECTED FOR PUBLICATION

ROBERT A. LESLIE,

Plaintiff-Appellant,

v.

WILLIAM C. LESLIE, MARGARET ANN LESLIE, DAVID LESLIE, and BRADLEY, CAMPBELL, CARNEY & MADSEN, P.C.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BOULDER COUNTY
Honorable Morris Sandstead, Judge
No. 92CV1470

Division V JUDGMENT AFFIRMED
Opinion by JUDGE HUME
Ruland and Casebolt, JJ., concur

Plaintiff, Robert A. Leslie, appeals the dismissal of his claim challenging the admission of his deceased father's will to probate. We affirm.

Plaintiff challenged his father's will as fraudulent and objected to its admission to formal probate. However, he neither attended a hearing scheduled to consider his challenge nor did he present any evidence to support his allegations, and the will was admitted into probate. After plaintiff unsuccessfully appealed the admission of the will to probate, he subsequently initiated this separate civil action seeking to attach the order admitting the will to probate on the basis of fraud.

I.

Plaintiff first contends that the trial court denied him due process by dismissing his claim without conducting a hearing. We disagree.

A trial court has discretion in determining the necessity of holding oral argument or an evidentiary hearing prior to ruling on a motion. If oral argument is neither requested by a party nor ordered by the court, a court must determine the motion based upon its own merits and any supporting or opposing briefs submitted. *Platte River Power Authority v. Nelson*, 775 P.2d 82 (Colo. App. 1989); C.R.C.P. 121 § 1-15(4).

Here, the record does not reflect that plaintiff requested a hearing in either of his two responses to defendant's motion to dismiss. Hence, we do not address any contentions of error asserted for the first time on appeal. In addition, we perceive no denial of fundamental fairness in the court's ruling on the motion to dismiss after considering the written materials submitted.

II.

Plaintiff next contends that the order admitting the will to probate should be revoked based upon his claim that the will was not properly executed, that it conflicts with a declaration which the testator made within months of his death, and that it is contrary to his father's wishes because the beneficiaries in the two purported wills differed drastically. He also asserts that the will was the result of undue influence and that revocation is

warranted because of a beneficiary's behavior both before and after his father's death. We disagree.

Plaintiff challenged whether the will was properly executed in his earlier action and is, therefore, barred from raising it in this action.

Res judicata bars a second action on a claim previously litigated when there is a final judgment and identify of the subject matter, claims for relief, and parties to the action. *Res judicata* bars all claims that were actually litigated in an earlier proceeding and any claims that should have been raised in that proceeding, but were not. Collateral estoppel bars relitigation of an issue if it is identical to one actually and necessarily adjudicated at a prior proceeding; if there was a final judgment on the merits; and if the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Collateral estoppel is conclusive in a subsequent action between the parties, whether that action is for the same or a different claim. *Denver v. Block 173 Associates*, 814 P.2d 824 (Colo. 1991).

The determination of issues in probating a will is an adjudication on the merits. *Glenn v. Mitchell*, 71 Colo. 394, 207 P. 84 (1922).

Here, plaintiff raised some of the theories supporting his contention that the will had not been properly executed in his written opposition to its admission to probate. Therefore, he had an opportunity to litigate those theories in the probate court, but did not do so. Despite plaintiffs' claims as to its invalidity, he [sic] will has been finally determined to be valid. Accordingly, we conclude that plaintiff was properly precluded from relitigating

both those claims and theories which he had previously raised and those which had been raised, in the earlier proceedings, but which should then have been asserted.

III.

Lastly, defendants request that attorney fees and costs be imposed against plaintiff for bringing this appeal. However, since plaintiff's conduct appears neither egregious nor to have been unequivocally pursued in bad faith, we disagree that sanctions are appropriate here. *See Wood Brothers Homes, Inc. v. Howard*, 862 P.2d 925 (1993).

The judgment is affirmed.

JUDGE RULAND and JUDGE CASEBOLT concur.

APPENDIX F

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC254
CERTIORARI TO THE COLORADO COURT OF APPEALS
NO. 93CA0185
DISTRICT COURT, BOULDER COUNTY, 92CV1470

ORDER OF COURT

ROBERT A. LESLIE,

Petitioner,

v.

WILLIAM C. LESLIE, MARGARET ANN LESLIE, DAVID LESLIE, AND BRADLEY, CAMPBELL, CARNEY & MADSEN, P.C.,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after reviewing the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, August 22, 1994.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

CIVIL ACTION NO. 91-S-2123

ROBERT A. LESLIE,

Plaintiff,

v.

COLORADO NATIONAL BANK OF DENVER, executor with will annexed and as devisee, WILLIAM C. LESLIE, MARGARET ANN LESLIE, DAVID LESLIE, ROBERT J. LESLIE, WALTER BARNES, LLOYD ROWLAND, and DOES I through X, as though set out individually,

Defendants.

DISMISSAL ORDER

THIS MATTER comes before the court on numerous motions by all of the Defendants for judgment on the pleadings or for dismissal, among other things.

A motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is treated as a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, ___, 1992 WL 171673 * 5 (10th Cir. July 24, 1992); *Bishop v. Federal Intermediate Credit Bank of Wichita*, 908 F.2d 658, 663 (10th Cir. 1990). A complaint should be dismissed only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief, even when all well-pleaded allegations in the complaint are accepted as true and

construed in the light most favorable to the plaintiff. *Mock*, ___ F.2d ___, 1992 WL 171673 at * 5.

The court, having reviewed the motions, the briefs filed in opposition, the applicable law, and being fully advised in the premises, finds and concludes that dismissal is required for several reasons: first, the court lacks jurisdiction over this civil action because complete diversity is lacking, no legitimate federal question is alleged, and the proper jurisdictional amount in controversy is not alleged; second, some Defendants named in the caption have no allegations made against them in the complaint while some Defendants who have been served with the complaint are not named in the caption; third, each of the issues that the Plaintiff seems to complain of has been previously litigated; fourth, this court has no authority to rescind a probate order previously unsuccessfully appealed in the state court or to grant the Plaintiff the other relief he seeks; and finally, the Plaintiff fails to state any valid claim for relief against any of these Defendants.

As to the Defendants' requests for Rule 11 sanctions, the court declines to impose sanctions against the Plaintiff at this time. However, the Plaintiff is put on notice that his continued pursuit of these claims in federal court may well be considered unwarranted, in bad faith, and subject to sanctions.

Accordingly, IT IS ORDERED that this civil action is DISMISSED.

DATED AT DENVER, COLORADO, this 29th day of September, 1992.

BY THE COURT:

/s/ Daniel B. Sparr
United States District Judge